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DANGERS OF SECOND MARRIAGES.

A REPLY.

If it does not appear presumptious in one who has so lately been a student under Professor Minor, openly to disagree with him, and if the subject is of sufficient general interest, I desire to reply to an article which appeared in the June number of the VIRGINIA LAW REGISTER under the above title (4 Va. Law Reg. 71.)

Does a man who marries a second time in Virginia, under a reasonable conviction that the first consort is dead, commit bigamy, in case his belief should turn out to be unfounded?

Mr. Minor reaches the conclusion, that if this belief is predicated upon *positive* but *untrue* evidence, sufficient to satisfy a prudent person, then he does not commit bigamy. In this, it is submitted, he is certainly not borne out by American authorities and text-books, nor, it would seem, by reason, nor by the policy of the law.

The statute provides in unequivocal terms that,

"If any person, being married, shall, during the life of the former husband or wife, marry another person in this State, or if the marriage with such other person take place out of this State, shall hereafter cohabit with such other person in this State, he shall be confined in the penitentiary not less than three nor more than eight years." Virginia Code, 1887, sec. 3781.

And the next section, 3782 of the Code, qualifies this by providing that,

"The preceding section shall not extend to a person whose former husband or wife shall have been continually absent from such person for seven years next before marriage of such person to another, and shall not have been known by such person to be living within that time; no to a person who shall, at the time of the subsequent marriage, have been divorced from the bond of the former marriage, or whose former marriage shall at that time have been declared void by the sentence of a court of competent jurisdiction."

Now does the legislature mean what it says, or does it mean something else? Professor Minor holds, and certainly without the support of the rules to be observed with regard to the construction of statutes,

that the legislative intent, or the reason and spirit of the law, is directly opposed to the letter of the law.

Did the legislature intend that a man might make a good defence to an indictment for bigamy, if he married a second time within the seven years limit, because he entertained "an honest belief, founded upon positive evidence that his former wife was dead, when in fact she was alive?"

Certainly such is not the reason and spirit of the law, for this statute was not passed as it is without due and mature consideration; it was not through inadvertence or lack of forethought that it was placed upon our statute books *just as it is.*

This very question has been carefully considered by the legislatures of most of our States, and twenty-three of them now have upon their statute books a law similar to ours—the length of time that must elapse before the second marriage varying in the different States. 2 Am. & Eng. Encyc. Law (1st ed.), 196.

In his article, Professor Minor draws rather a curious distinction between belief founded upon circumstantial evidence, and belief founded upon direct or positive evidence.

He supposes a case in which a married man suddenly disappears, or goes off on a long journey, and remains unheard from, after a more or less extended period; and concludes that the wife would be guilty of bigamy were she to marry again within seven years, if in fact her former husband were still alive, "No matter how sincerely she may believe him to be dead, no matter how carefully and thoroughly she may search for clues of his existence or whereabouts," because she has no positive evidence of his death.

Now is it not a fact that circumstantial evidence is often equal, and in some cases superior, to positive evidence? Why then draw the line at positive evidence? Can not a prudent person found a *bona fide* belief upon circumstantial as well as positive evidence? An honest belief, such as would satisfy a prudent person (as the law requires) *is* an honest belief, no matter whether founded upon circumstantial or positive evidence. Under some circumstances, easily imagined, a reasonably prudent man might found an honest belief in the death of his wife, upon absence alone, as well as upon more positive evidence. It is, therefore, difficult to see why our courts should make any such distinction, especially when it is in the very teeth of the statute.

And certain it is that the American cases, cited by Professor Minor.

make no such distinction; the Alabama authority only intimating that such might be the case. *Jones* v. *State*, 67 Ala. 86.

It is true that the law as it stands may, under some circumstances, work an injustice, but such is the law, and if it is an unjust law, then let the people through their representatives change it, and let not the courts read an exception into the statute. It is a legislative and not a judicial question, and if we once begin to disregard the rule that "the law is to command and the judges and the jury to obey," if our judges once admit the propriety of professing to believe as law that which they know is not law, then no one can tell to what length this deviation will go, and legal certainty will be sacrificed at the shrine of judicial discretion.

Another reason why this statute should be followed according to its terms is because public policy requires it. If our courts once establish the law in accordance with Professor Minor's views, they will open wide the door for fraud. Sir James Mackintosh says that the two institutions of marriage and property are the corner-stones upon which civilization is built, and so the courts should watch with a jealous eye any tendency to loosen the marriage tie.

Suppose Professor Minor's view to be adopted as the correct interpretation of the law, and to become generally known, how easy would it be for a man who has tired of his wife and wants to make a change, to do so, and still hold himself beyond the clutches of the law, simply by manufacturing a little positive evidence, as, for example, having a letter written to him telling him that his wife is dead, as was done in one of the cases cited by Professor Minor. Thus it is seen that the door would be opened wide for fraud and collusion, and ill-mated couples could evade law and laugh in the face of the courts; for fraud and collusion are so subtle in their nature that when there is any positive evidence whatever upon which the defence can work, it would be difficult for the eye of justice to detect the fraud or collusion, especially when twelve men must be convinced of it beyond a reasonable doubt.

It would indeed seem strange for our legislature to lay down a positive law, and make the man who disregarded that law a felon and fix his punishment, and then intend (without saying so) to so construe that law that one man who broke it would have a good defence because he acted innocently upon positive evidence sufficient to convince a prudent person, and another should be found guilty, though he also acted innocently, but upon a different kind of evidence, though it may have been equally as convincing to him.

It seems to the writer that such was not the intention of the legislature, and that such is not the policy of the law.

The statute is plain; it is imperative, and should be followed by the courts.

If, in any particular case, the statute seems to work an injustice, then let the hand of executive clemency repair its defects, as was done in the case of *Com.* v. *Mash*, 7 Metcalf (Mass.), 472.

Far better to follow this law to the letter and have it thus defective than to have a law upon our statute books that is so changed by the rulings of courts that by it designing persons may cover up their villainy and work it to suit their own ends.

While contending that this law should be followed strictly, according to its terms, I am not unmindful of the fact that the courts are often justified in departing from the letter of the law; but it seems that in this case we should presume that the intention of the legislature was that the statute should be followed strictly, because it is contrary to public policy to do otherwise, as has been pointed out above.

It should be remembered that intent in the crime of bigamy is not an essential element.

"One who marries, not having a reasonable belief of his first wife's death, or if he honestly believes her to be dead, the statutory time not having elapsed, is guilty of bigamy without further proof of intent." 2 Am. & Eng. Encyc. Law (1st ed.), 194, and cases cited in note.

"Where a statute in general terms makes an act indictable, a criminal intent need not be shown in one indicted under it, unless the purpose to require it can be discovered in the language employed." *Halstead* v. *State*, 12 Vroom (N. J.), 552; 32 Am. Rep. 247.

"Where an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which imparts to it the character of an offence." 11 Am. & Eng. Encyc. Law (1st ed.), 372.

As to the authorities cited by Prof. Minor, not one of the American cases fully sustains his view; that is, none of them makes the distinction that he makes, while, on the contrary, the Supreme Court of Massachusetts, the strongest of all our State courts, has, within the last three years decided most positively and directly against it, in a case where the distinction must have been seen, but it was not recognized in the decision. *Com.* v. *Hayden*, 163 Mass. 453.

It is admitted that the text-books do not sustain this "positive evidence" theory, but, on the contrary, they all say that "an honest but erroneous belief that the absent consort is dead, is no defence."

Well does Mr. Wharton say, 1 Whart. Cr. L. (8th ed.), sec. 1705:

"To sustain a second marriage, and to vacate a first, because one of the parties believed the other to be dead, would make the existence of the marital relation determinable, not by certain extrinsic facts, easily capable of forensic ascertainment and proof, but by the subjective condition of individuals. To avoid this the statutes have made the dissolution of marriage, whether by death or divorce, dependent, not upon the personal belief of parties, but upon certain objective facts easily capable of accurate judicial cognizance."

We submit, then, that there is no authority to sustain Professor Minor's view, and that no reason exists for making a judicial change in our statute.

It is believed that in all cases the man who marries a second time within the seven years limit does so at his peril, even though under a *bona fide* but erroneous belief that his former wife is dead.

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CONTRIBUTION BETWEEN CO-SURETIES.

(*Pace* v. *Pace.*)

A REPLY.

In the September number of the LAW REGISTER Mr. J. T. Coleman, of the Lynchburg bar, has an able and interesting article, in which he states the difficulties which have confronted him in his efforts to reconcile the decision in this case, with what he conceives to be the true principles by which it should have been governed.

He thinks the conclusion reached by the court was illogical and the result inequitable. As there continues to exist a difference of opinion among lawyers as to the correctness of this decision, with the permission of the editor, I will accept the law and facts as stated by Mr. Coleman, and endeavor to show that the decision was just, and the conclusion strictly and severely logical.

The facts as stated by Mr. Coleman are as follows:

"Talbott, as principal, and John R. Pace and James B. Pace, as his sureties, made and delivered to Cheek a note for—let us say in round numbers—$16,000. Talbott died entirely insolvent. John R. Pace also died, leaving assets sufficient to pay only fifty cents on the dollar of his debts. After the latter's death, James B. Pace paid the note, and then set it up as a debt against the estate of John R. Pace, claiming dividends, or apportionments in the distribution of that estate, on the whole amount so paid by him until he had received one-half thereof."